

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 292 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and  
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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INNOSEARCH LIMITED

Versus

COMMISSIONER OF INCOME TAX  
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Appearance:

MR KC PATEL for Petitioner  
MR MANISH R BHATT for Respondent No. 1  
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CORAM : MR.JUSTICE R.BALIA. and  
MR.JUSTICE A.R.DAVE

Date of decision: 29/04/99

ORAL JUDGEMENT

At the instance of the assessee, the following two questions of law said to be arising out of the Tribunal's order dated 24.2.84 in ITA 197/Ahd/82 relating to the assessment year 1979-80 have been referred to this Court for its opinion:-

1. "Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in disallowing the gratuity liability of Rs.75,644/- claimed by the appellant u/s. 28 and/or u/s. 37 of the Act?".

2. "Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the lower authorities were justified in disallowing sum of 15% of Rs.304914/- incurred by the assessee as Dealers Aid u/s. 37(3A) of the I.T. Act 1961?"

2. The question no.1 relates to the claim of the assessee for deduction of increment in gratuity liability relating to previous year relating to assessment year in question amounting to Rs.77644/-. It was the liability projected in future and not actually discharged during the relevant previous year to the assessment year in question. Until before insertion of Section 40 A (7) the claim of such increased liability of gratuity was governed by the provisions of Section 36, where a provision to that effect was made in the Books of A/c or under Section 37 where method of Accounting adopted by the Assessee is mercantile system. However, with the insertion of Section 40 A (7) position materially altered and no deduction in computing income under the head Profits and gains of year of account by way of provision for gratuity be allowed except in accordance with conditions specified in clause (b) of Section 40 A (7). This position has been made beyond pale of doubt by the Supreme Court in Shree Sajjan Mills Ltd Vs. CIT, MP & Another 156 ITR 585. As there is no dispute about the fact that the provisions of Section 40-A (7) have not been complied in the present case our answer to question no.1 is in the affirmative i.e. in favour of the Revenue and against the Assessee.

3. The question no.2 relates to reducing the claim of the assessee for deduction of expenses incurred by him by way of supply of danglers, posters, streamers to the dealers for display at retail counter shops by having recourse to Section 37(3A) of the Income Tax Act, 1961 by 15% of the sum claimed by the assessee. Sub-section 3A of Section 37, which was in force at the relevant time required to reduce the aggregate expenditure incurred by an assessee on advertisement, publicity and sales promotion in India at a scale provided under that provision if the total sum of such expenses exceeded Rs.40000/-. The assessee's contention in the present case is that the supply of danglers, posters etc to its dealer was neither advertisement nor by way of publicity or by way of Sales promotion but such expenses were incurred as incentive and discount to the dealers and was part of the selling expenses.

4. From the perusal of the Tribunal's order we find that the sample material in respect of which the disputed expenses were incurred by the assessee were exhibited before the Tribunal alongwith other evidence. On considering the same, the Tribunal reached a finding that Items like danglers are exhibited in the shops indicating the product which is marketed and sold by a particular dealer or retailer. Similarly posters, streamers exhibit various items dealt in by the assessee. Similarly tin plates showing various products dealt in by the manufacturers are also exhibited at providing places by the dealers. Though these items are stated to be as dealers aid they are more in nature of aim to the consumers, for whom it would be possible to locate the dealer who deals in these items. It certainly subserves the purpose of advertisement and publicity. Therefore these items would fulfil the test of advertisement or publicity. The functions items performs have to be taken into consideration. It cannot be said that the functional use of these items could be divorced from the element of publicity or an advertisement can be added therein.

4. Having given our anxious and thoughtful consideration, we are of the opinion that on consideration of material whether a particular item is aimed to attract the consumer or is merely an aid of selling is a question of fact and does not give rise to a question of law. The Tribunal has definitely come to a conclusion that expenses on these items are primarily aimed to attract the consumer and is part of publicity expenditure. This conclusion is a conclusion of fact and does not give rise to any question of law.

5. As answer to question no.2 depends on the conclusion of fact reached by the Tribunal we decline to answer this question, as in our opinion, it is not a question of law.

6. The reference accordingly stands disposed of.

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